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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ROY C. CHEATHAM, and 72 other class members for themselves and the class of more than 800 federal law enforcement officers,

Petitioners,

v.

H. E. MONROE, JR., as Commissioner of the Alabama Department of Revenue; DOUG NELSON, individually and as President of the Alabama State Police Association; and STEVE WOLFE, individually and as President of the Alabama State Trooper Association, Inc.,

Respondents.

Petition for Writ of Certiorari to the Court of Civil Appeals of Alabama

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PETTTION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Alabama's state income tax, which taxes all the income of federal law enforcement officers, but excludes from taxable income a portion of the income Alabama pays its own state law enforcement officers, violates the Public Salary Tax Act (4 U.S.C. § 111 (1988)) or the Supremacy Clause of the Constitution (U.S. CONST. art. VI, cl. 2).

ALL PARTIES TO THE PROCEEDING

Petitioners/Plaintiffs

Roy C. Cheatham
Lawrence E. Smith
Danny R. Whitson
Henrietta S. Curry
Donald R. Shirley
Robert J. Tolbert
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Perry L. Zaner
Juan E. Burke
Ricky L. Smith
Nolan McAlpine
Dave L. Behrend
Kenneth Holt

A class composed of all individuals employed by the United States of America, or any of its agencies, as law enforcement officers, who earned wages in Alabama for such employment during any of the calendar years 1990; 1991; 1992; 1993; 1994; or 1995, and have, without a concluded final assessment determining tax liability, either paid Alabama state income tax thereon for any of the calendar years 1990; 1991; 1992; 1993; 1994; or 1995, or incurred potential Alabama state income tax liability for any of those calendar years.

Respondent/Defendant

H.E. Monroe, Jr., as Commissioner of the Alabama Department of Revenue

Respondents/Intervenors

Doug Nelson
Steve Wolfe
Alabama State Police Association
(no parent or subsidiary)
Alabama State Trooper Association, Inc.
(no parent or subsidiary)

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PETITION FOR WRIT OF CERTIORARI

REFERENCE TO REPORTS OF OPINIONS

The Alabama Court of Civil Appeals decision sought to be reviewed is *Cheatham v. Eagerton,* No. 2951068, slip op. (Ala. Civ. App. Mar. 14, 1997) and is not yet officially reported. A-1a. An unofficial citation is 1997 Ala. App. LEXIS 205.

BASIS FOR JURISDICTION

The decision sought to be reviewed is the judgment of the Alabama Court of Civil Appeals dated March 14, 1997. The Alabama Court of Civil Appeals denied a timely application for rehearing on May 9, 1997. A-11a. The Alabama Supreme Court denied the Petitioners' timely Petition for Writ of Certiorari to the Alabama Court of Civil Appeals on August 22, 1997. A-12a.

This Court has jurisdiction over the present case under 28 U.S.C. § 1257(a) (1988). Supreme Court Rule 10(c) states also that jurisdiction is proper when "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case and are reprinted in the appendix at pages 13a to 31a (both inclusive):

U.S. CONST. art. VI, cl. 2

4 U.S.C. § 111

ALA. CODE § 36-21-2 (1975)

ALA. CODE § 40-18-2 (1975)

Act of Sept. 5, 1973, No. 763, 1973 ALA. ACTS 1145

Act of Nov. 14, 1975, No. 99, 1975 ALA. ACTS 2780

Act of May 15, 1984, No. 84-306, 1984 ALA. ACTS 679

Act of May 29, 1985, No. 85-754, 1985 ALA. ACTS 1254

Act of Apr. 29, 1986, No. 86-433, 1986 ALA. ACTS 799

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Act of May 29, 1997, No. 97-720, 1997 ALA. ACTS

STATEMENT

At least since 1986, federal law enforcement officers employed in Alabama have paid and are paying a larger Alabama state income tax than identically situated state law enforcement officers, the only difference between the two being the source of their income. The State of Alabama is indirectly taxing federal activity, specifically federal law enforcement, to provide a disproportionate amount of the state's funding.

Since 1973, the State of Alabama has paid law enforcement officers employed by the State in certain specifically named state agencies, a daily amount over and above their regular pay. A-18a. It called the additional sum a "subsistence allowance." *Id.* The only conditions to its receipt were that the employee be:

1. A state law enforcement officer of the State of Alabama;
2. Employed in certain specifically named state agencies; and
3. Engaged in the performance of his duties as a law enforcement officer.

Id. There was no mention of federal or state tax liability on this sum. *Id.*

In 1984, the legislature added a provision to the "subsistence allowance" as follows:

> (b) It is the legislative intent of the legislature that the subsistence allowance provided by this section is to be solely a subsistence expense allowance for the purpose of providing meals while said officers are on

> duty, and is not to be considered as compensation under the laws of this state. It is the legislative intent that this subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government.

A-20a to A-21a. Two years later it eliminated any restriction on the use of the "subsistence allowance" by deleting the first sentence of this subsection, but retained the exclusion from income tax, which now provides:

> (b) This subsistence allowance shall not be subject to any income or other taxes levied by the State of Alabama or the federal government.

A-24a. The attempt by the Alabama legislature to make the income free of federal tax is not an issue in this case, as that attempt has been universally recognized as futile, most importantly by the Internal Revenue Service. Since the enactment of subsection (b), the favored state law enforcement officers have received pay free of state income tax for engaging in their duties as law enforcement officers, while federal law enforcement officers must pay state income tax on all of their income while engaging in their duties. Thus, a federal law enforcement officer will pay a larger Alabama state income tax than an identically situated state law enforcement officer, the only difference between the two being the source of the income.

The plaintiffs, in their initial complaint filed in state court, challenged the validity of Alabama's state income tax laws, which excluded from taxable income a portion of the amounts the State paid to its own employees, but gave no similar exclusion from income to federal employees, taxing federal officers on all of their wages. A-34a to A-36a (both inclusive).

The trial court acknowledged the nature of this challenge in its final order when it noted that "Plaintiffs claim that there is a discriminatory tax scheme in violation of 4 U.S.C. § 111 as a result of their not being given the same exemption afforded certain state law enforcement

officers pursuant to Sec. 36-21-2, Code." A-6a. The trial court ruled, however, that a statute which gave a state income tax exclusion only to certain employees of the State, but not to those employed by the United States and others, did not discriminate on the basis of the source of the income. A-9a to A-10a.

The Alabama appellate court decision of which review is sought acknowledged that "[t]he dispositive issue is whether the tax scheme at issue violates the doctrine of intergovernmental tax immunity and 4 U.S.C.A. § 111." A-2a. It resolved that issue, however, by allowing the described discrimination, holding illogically that a state income tax scheme which taxed all the income of federal law enforcement officers but excluded income of state officers calculated at a *per diem* rate, did not discriminate on the basis of the source of the income, but rather it discriminated against the federal employees because they "do not receive a comparable daily . . . allowance from the Federal Government." A-3a.

REASONS FOR GRANTING THE PETITION

It is important for this Court to grant the petition because the decision of the Alabama courts:

(a) directly challenges the authority and supremacy of federal law, contravening a specific federal statute, the Public Salary Tax Act;

(b) decided an important federal question in a way which conflicts with decisions of this court, particularly *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376 (1960) which held that a State may not impose tax burdens on those who deal with the federal government while not imposing the same burdens on others similarly situated, and *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989) which held that heavier taxes imposed on those dealing with one sovereign than on those dealing with the other must be justified by significant differences between the two classes; and

(c) allows a discrimination against more than 800 federal employees in Alabama which continues to expand and enlarge.

Because of the limits on district court review of state tax matters contained in 28 U.S.C. § 1341 (1988), this Court is the only federal forum available to prevent a state from enlarging its tax revenues at the expense of federal employees, while exempting its own employees from the burdens placed on the federal employees. *Arkansas v. Farm Credit Serv. of Cent. Ark.*, 520 U.S. ——, 138 L.Ed.2d 34, 38 (1997). The statute at issue is facially discriminatory in that it benefits only state employees. No others can obtain the tax exclusion, no matter their circumstances.

This Court has already noted that "[t]he danger that a state is engaging in impermissible discrimination against the Federal Government is greater when the State acts to benefit itself and those in privity with it." *Davis v. Michigan Dept. of Treasury*, 489 U.S. at 815 n.4. "Accordingly, it does not seem too much to require that the state treat those who deal with the [Federal] Government as well as it treats those with whom it deals itself." *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. at 385. The Alabama courts have allowed the State to benefit its own employees with an expanding and enlarging tax exclusion not given to employees of the Federal Government. Only this Court is available to halt the discrimination.

I. CHALLENGE TO FEDERAL SUPREMACY

Alabama's state income taxation scheme is specifically prohibited by the Public Salary Tax Act of 1939, codified at 4 U.S.C. § 111 (1988). The operative words in 4 U.S.C. § 111 (1988) are that "[t]he United States consents to the taxation of pay or compensation . . . if the taxation does not discriminate . . . because of the source of the pay or compensation." *Davis v. Michigan Dept. of*

Treasury, 489 U.S. at 809 (ellipsis in original; internal quotes omitted). The "nondiscrimination clause closely parallels the nondiscrimination component of the constitutional immunity doctrine which has, from the time of the McCulloch v. Maryland [4 Wheat. 316 (1819)], barred taxes that 'operat[e] so as to discriminate against the Government or those with whom it deals.'" *Id.* at 812 (second brackets in original).

Alabama's state income tax discriminates against those with whom the United States deals, its law enforcement employees. No federal law enforcement officers can qualify for the exclusion and they all pay the higher tax. ALA. CODE § 40-18-2 (1975). All state law enforcement officers receiving the extra funds are granted the exclusion and all pay the lower tax. ALA. CODE § 36-21-2(b) (1975). This is a discrimination based solely on the source of the income received by the federal officers. If they had been paid by the state, they would pay a lower tax, but since they are paid by the United States, they pay a higher tax. The exclusion, by its terms and on its face, applies only to employees of the State of Alabama. ALA. CODE § 36-21-2 (1975). This is discrimination on the basis of the source of the income.

Alabama's courts attempt to distinguish between state and federal employees on the basis that employees of one receive income calculated on a *per diem* basis while employees of the other do not. A-3a. A distinction on that basis is nonsensical. Such a distinction is not a "significant difference" as required by *Davis*, and it creates an "Alabama rule" which ignores and contravenes established federal law. There is no distinction between $8.00 paid to a state officer and $8.00 paid to a federal officer, even if the $8.00 paid to the state officer is calculated at a *per diem* rate and the $8.00 paid to a federal officer is paid as a part of an annual salary. Such a claimed distinction has no more significance than discriminating on the basis of the color of the check by which the funds

are paid. Alabama may not provide that compensation paid with a pink check (used by the state comptroller) is excluded from income and compensation paid with a green check (used by the U.S. Government) is fully taxable. The rule announced is no less foolish.

The state court erred by focusing on the calculation of the extra pay which state employees receive by virtue of ALA. CODE § 36-21-2(a) (1975) and which is calculated on a *per diem* basis, rather than the exclusion of ALA. CODE § 36-21-2(b) (1975). It is the latter, not the former, which creates the unconstitutionality. The State may pay its employees whatever amount it chooses, and calculate that pay however it pleases. It may not, however, exclude any portion of what it pays its employees from state income tax without allowing similar exclusions to federal employees, unless there are significant differences between the two. No such differences are expressed in the statute.

The Alabama courts have enunciated a holding which directly challenged the supremacy of 4 U.S.C. § 111 in Alabama, and has held it for nought. "[T]he laws of the United States . . . shall be the supreme Law of the Land. . . ." U.S. CONST. ART. VI, cl. 2. This Court is the only federal forum available to reestablish the supremacy of federal law. It is important that it do so.

II. CONFLICTS WITH PRIOR SUPREME COURT DECISIONS

There is ample compelling authority from this Court that the extra burden of taxation imposed on federal law enforcement officers by the Alabama state income tax is unconstitutional and void because it violates the intergovernmental tax immunity doctrine. "[U]nder current intergovernmental tax immunity doctrine the States can never tax the United States directly but can tax any private parties with whom it does business . . . *as long as the tax*

does not discriminate against the United States or *those with whom it deals.*" *South Carolina v. Baker,* 485 U.S. 505, 523 (1988) (emphasis supplied).

The decision in this case allows Alabama's state income tax to discriminate against those with whom the United States deals, its law enforcement employees. There is a simple demonstration illustrating that the tax discriminates against those who deal with the federal government. *All* federal law enforcement officers are denied the exclusion and pay the higher tax. ALA. CODE § 40-18-2 (1975). *All* state law enforcement officers receiving the extra funds have the exclusion and pay the lower tax. ALA. CODE § 36-21-2(b) (1975). This is a discrimination based solely on the source of the income received by the federal officers.

In *Davis v. Michigan Dept. of Treasury* the State of Michigan taxed the retirement benefits of federal civil service employees, but exempted retirement benefits of state retirees. *Davis v. Michigan Dept. of Treasury,* 489 U.S. at 805. The state argued that its interest in hiring and retaining qualified civil servants, and the fact that federal retirement was more generous than state retirement were sufficient "significant differences" to justify the discrimination. *Id.* at 816. This Court concluded that they were not, however, and determined that the Michigan levy "violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees." *Id.* at 817. *Davis* "held that the United States had not consented under 4 U.S.C. § 111 to this discriminatory imposition of a heavier tax burden on federal benefits than on state and local benefits." *Harper v. Virginia Dept. of Taxation,* 509 U.S. ——, 125 L.Ed.2d 74, 82 (1993) (footnote omitted). Likewise, the United States has not consented to a discriminatory imposition of a heavier tax burden on the compensation for personal services of federal law enforcement officers.

The exclusion of income from taxation in issue here, granted in ALA. CODE § 36-21-2(b) (1975), is, in all material respects, identical to the exemption provided for income from state employees' pensions contained in ALA. CODE § 36-27-28 (1975). This latter provision has been specifically noted by this Court as giving "preferential tax treatment to benefits received by employees of state and local governments relative to the tax treatment of benefits received by federal employees." *Harper v. Virginia Dept. of Taxation*, 509 U.S. ——, 125 L.Ed.2d at 83. It was found unconstitutional in *Sizemore v. Rinehart*, 611 So.2d 1064, 1067 (Ala. Civ. App. 1992) to limit that exemption exclusively to state employees and not federal employees, but Alabama's state courts have not applied the same principle to the exclusion in issue here, ALA. CODE § 36-21-2(b) (1975).

In this case it is without question that a federal law enforcement officer will have "a heavier tax burden on [his] federal benefits" than a state counterpart will have on his state benefits, all else being equal. If, for example, a state law enforcement officer receiving the additional compensation provided in ALA. CODE § 36-21-2(a) (1975), and a federal law enforcement officer, receive exactly the same "gross income" as that term is defined in ALA. CODE § 40-18-14(1) (1975), and if these two law enforcement officers have identical tax situations with respect to marital status, exemptions, deductions and other tax significant facts, the federal employee will pay more state income tax than the state counterpart.

States have the power to tax the wages of federal employees only in a nondiscriminatory manner. States may not impose discriminatory taxation on the federal government. *McCulloch v. Maryland*, 4 Wheat. 316, 330 (1819). The basis of this decision was that state taxation of a federal instrumentality would unconstitutionally interfere with the exercise of the federal government's delegated powers. *Davis v. Michigan Dept. of Treasury*, 489 U.S.

at 810. As it relates to governmental salaries, "the purpose of the immunity was . . . to prevent undue interference with the one government by imposing on it the tax burdens of the other." *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 483-484 (1939). A nondiscriminatory taxation scheme does not impose one government's burdens on another. *Id.* at 487. However, "a State may not single out those who deal with the [Federal] Government . . . for a tax burden not imposed on others similarly situated." *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. at 383.

Alabama's state individual income tax taxes all the compensation for services received by federal law enforcement officers, but excludes some compensation for services of some state law enforcement officers. This scheme singles out federal law enforcement officers for a tax burden not imposed on state employees similarly situated, directly contravening the holding in *Phillips Chemical Co.* The Alabama state income tax treats those who deal with the federal government less well than those with whom it deals itself. The class of over 800 federal officers asks only that its members be treated equally with their state counterparts.

It is important that this Court not allow the Alabama courts to engage in a latter day nullification to avoid this Court's holdings in *Davis v. Michigan Dept. of Treasury*, and *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*

III. ENLARGING AND EXPANDING DISCRIMINATION

When the Act of May 15, 1984, No. 84-306, 1984 ALA. ACTS 679 first enacted the exclusion from state income tax as a part of ALA. CODE § 36-21-2(b) (1975), it affected the employees of six (6) state agencies and excluded $8.00 per day from taxable income. A-20a. The next year another agency was added to the list by Act of May 29, 1985, No. 85-754, 1985 ALA. ACTS 1254. A-22a. The Act of July 2, 1987, No. 87-344,

1987 ALA. ACTS 508 added four more agencies. A-25a. Another agency joined the list the next month with the adoption of Act of Aug. 13, 1987, No. 87-814, 1987 ALA. ACT: 1625. A-27a. After this case was filed, Act of Apr. 22, 1994, No. 94-595, 1994 ALA. ACTS 1102 added still another agency to bring the total to thirteen. A-28a. After the announcement of the decision sought to be reviewed in this case, the amount of the exclusion was increased by Act of May 29, 1997, No. 97-720, 1997 ALA. ACTS —— from $8.00 per working day to $12.00 per working day. A-30a to A-31a. The tax benefit to state officers increased thereby.

Alabama's marginal tax rate is 5%. ALA. CODE § 40-18-5 (1975). Prior to the 1997 amendment state officers received about $100.00 per year tax advantage, assuming 250 working days in a year. Now their state income tax advantage over federal officers is $150.00 per year.

The political reality is that the number of favored state employees and the amount by which they are favored will continue to grow until restrained by a proper application of existing legal precedents. It is important that this Court provide this restraint.

CONCLUSION

It is a conscious practice in some states to enact taxes that are questionable constitutionally and then to play what they call the "certiorari lottery." This is what Alabama is doing in this case. If Alabama wins the "lottery," it will be financing some of its operations by exacting a disproportionate tax payment from federal employees. It will have wounded the Public Salary Tax Act with a wound which will fester as the discrimination expands and enlarges. It is important to the performance of the federal law enforcement function in Alabama that the writ issue to halt the state's incursion on federal authority.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 19, 1997